No. 93-986

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MARGARET MCINTYRE,

Petitioner,

—v.—

OHIO ELECTIONS COMMISSION,

Respondent.

ON WRIT OF *CERTIORARI* TO THE SUPREME COURT OF OHIO

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1. Did the Ohio Supreme Court err in upholding an Ohio statute that imposes a flat ban on distribution of anonymous political campaign leaflets?

2. Even if facially valid, can Ohio's statute banning anonymous political campaign literature be applied to punish petitioner's distribution of political leaflets advocating defeat of a nonpartisan referendum on school taxes without violating the First Amendment?

LIST OF PARTIES AND RULE 29.1 STATEMENT

The two parties to the proceedings and in this Court are petitioner Margaret McIntyre, the defendant-appellant below, and respondent Ohio Elections Commission, the enforcement agency and appellee below. Margaret McIntyre is a private citizen.

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OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reported as *McIntyre v. Ohio Elections Commission*, at 67 Ohio St.3d 391 (1993). It is reprinted in the petition appendix at pages A1-A15. The finding of the Ohio Elections Commission is represented in the petition appendix at page A40. The opinions of the Franklin County Court of Common Pleas and the Court of Appeals of Ohio for the Tenth Appellate District are unpublished and are reprinted in the petition appendix at pages A33-A35 and A16-A32 respectively.

JURISDICTION

On March 30, 1989, petitioner Margaret McIntyre was charged with violating Ohio Revised Code §3599.09 which prohibits the distribution of campaign leaflets that do not contain the name of the person who prepares and distributes them. On March 30, 1990, the Ohio Elections Commission issued its decision finding that peti-

tioner violated R.C. §3599.09 and fined her $100. On April 6, 1990, petitioner appealed this case to the Franklin County Court of Common Pleas. On October 2, 1990, the Court of Common Pleas reversed the decision of the Ohio Elections Commission and held that §3599.09 was unconstitutional as applied to the petitioner. On April 7, 1992, the Court of Appeals of Ohio for the Tenth Appellate District reversed the Court of Common Pleas. On September 22, 1993, the Ohio Supreme Court affirmed the appellate court and held that §3599.09 is constitutional on its face and as applied to the facts of this case.

The jurisdiction of this Court to review the September 22, 1993 judgment of the Ohio Supreme Court is invoked under 28 U.S.C. §1257(a).

THE CONSTITUTIONAL PROVISIONS AT ISSUE

Constitution of the United States, Amendment I.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, Amendment XIV, Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

THE STATUTORY PROVISION AT ISSUE

Ohio Revised Code §3599.09.

> (A) No person shall write, print, post, or distribute, or cause to be written, printed, posted, or distributed, a notice, placard, dodger, advertisement, sample ballot, or any other form of general publication which is designed to promote the nomination or election or defeat of a candidate, or to promote the adoption or defeat of any issue, or to influence the voters in any election, or make an expenditure for the purpose of financing political communications through newspapers, magazines, outdoor advertising facilities, direct mailings, or other similar types of general public political advertising, or through flyers, handbills, or other nonperiodical printed matter, unless there appears on such form of publication in a conspicuous place or is contained within said statement the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefore. The disclaimer "paid political advertisement" is not sufficient to meet the requirements of this division. When such publication is issued by the regularly constituted central or executive committee of a political party, organized as provided in Chapter 3517. of the Revised Code, it shall be sufficiently identified if it bears the name of the committee and its chairman or treasurer. No person, firm, or corporation shall print or reproduce any notice, placard, dodger, advertisement, sample ballot, or any other form of publication in violation of this section. This section does not apply to the transmittal of personal correspondence that is not reproduced by machine for general distribution.

The secretary of state may, by rule, exempt, from the requirements of this division, printed matter and certain other kinds of printed communications such as campaign buttons, balloons, pencils, or like items, the size or nature of which makes it unreasonable to add an identification or disclaimer. The disclaimer or identification, when paid for by a campaign committee, shall be identified by the words "paid for by" followed by the name and address of the campaign committee and the appropriate officer of the committee, identified by name and title.

STATEMENT OF THE CASE

On March 19, 1990, Mrs. Margaret McIntyre was fined $100 by the Ohio Elections Commission for distributing leaflets opposing the passage of a local school tax levy. The Ohio Elections Commission imposed the fine because the leaflets did not contain her name and address as required by Ohio Revised Code §3599.09, which prohibits the distribution of all anonymous campaign literature. The Ohio Supreme Court upheld the fine on September 22, 1993.

The events in this case began on the evening of April 27, 1988, outside the Blendon Middle School in Westerville, Ohio. At that time, Mrs. McIntyre; her son, a student in the Westerville schools; and his girlfriend were distributing leaflets opposing the passage of a school tax levy that was to be voted on at a nonpartisan referendum scheduled for the following week. (J.A.30). Mrs. McIntyre was distributing the leaflets at the Blendon Middle School that evening because it was the site of a previously scheduled public meeting at which the Westerville superintendent of schools planned to address the merits of the tax levy. (J.A.28). During the meeting the superintendent specifically made reference to statements contained in the leaflets. (J.A.15).

Mrs. McIntyre stood outside the school near the doorway to the meeting room and handed leaflets to persons as they entered the building. (J.A.15). Her son and his girlfriend distributed additional leaflets in the school parking lot by placing them under automobile windshield wipers. (J.A.30). The leaflets stated:

VOTE NO
ISSUE 19 SCHOOL TAX LEVY

Last election Westerville Schools, asked us to vote yes for new buildings and expansions programs. We gave them what they asked. We knew there was crowded conditions and new growth in the district.

Now we find out there is a 4 million dollar deficit -- WHY?

We are told the 3 middle schools must be split because of over-crowding, and yet we are told 3 schools are being closed -- WHY?

A magnet school is not a full operating school, but a specials school.

Residents were asked to work on a 20 member commission to help formulate the new boundaries. For 4 weeks they worked long and hard and came up with a very workable plan. Their plan was totally disregarded -- WHY?

WASTE of tax payers dollars must be stopped. Our children's education and welfare must come first. **WASTE CAN NO LONGER BE TOLERATED.**

PLEASE VOTE NO
ISSUE 19

THANK YOU,

CONCERNED PARENTS
AND
TAX PAYERS

J. Michael Hayfield, Assistant Superintendent of Elementary Education for the Westerville schools, observed Mrs. McIntyre distributing the leaflets. He examined the leaflets and told her that she was not in compliance with Ohio election laws. (J.A.28).

On the next evening, April 28, 1988, a similar school meeting was held at the Walnut Springs Middle School. Again, petitioner stood outside of the school and distributed leaflets opposing the school tax levy to persons entering the building to attend the meeting. Again, Mr. Hayfield observed her distributing leaflets and noted that they did not conform to Ohio election laws. (J.A.15).

Following Mrs. McIntyre's leafletting on April 27, 1988 and April 28, 1988, the school tax levy failed. It was again defeated in a second election. In November of 1988, on the third try, it finally passed. (Pet. App. A10). On April 6, 1989, five months after the passage of the twice-defeated levy, and approximately one year after her leafletting, Mrs. McIntyre received a letter from the Ohio Elections Commission informing her that a complaint had been filed against her. (J.A.10). The complaint, filed by Assistant Superintendent Hayfield, charged her with violating Ohio Revised Code §3599.09 and two other statutes because the leaflets she had distributed at the Blendon and Walnut Springs Middle Schools, during the two evenings in April of the previous year, did not contain her name and address.[1]

Initially, the charges were dismissed for want of prosecution. (J.A.18). A short time later, they were reinstated at the request of Assistant Superintendent

[1] In addition to being charged with violating §3599.09, prohibiting distribution of anonymous campaign materials, Mrs. McIntyre was charged with violations of Ohio Revised Code §3571.10(D)(failure to file a designation of treasurer) and §3517.13(E)(failure to file a PAC report).

Hayfield. On March 19, 1990, a hearing was held before the Ohio Elections Commission on the charges against Mrs. McIntyre. At the conclusion of its March 19th hearing, the Ohio Elections Commission found that Mrs. McIntyre had distributed unsigned leaflets and fined her $100 for violating Ohio Revised Code §3599.09; the other charges were dismissed.[2] (J.A.41).

On September 10, 1990, the Franklin County Court of Common Pleas reversed, holding that §3599.09 was unconstitutional as applied. (Pet.App. A33). On April 7, 1992, the Ohio Court of Appeals reversed the Court of Common Pleas and reinstated the fine. (Pet.App. A16). That decision was affirmed by the Ohio Supreme Court on September 22, 1993, which concluded that:

> The requirement of R.C. 3599.09 that persons responsible for the production of campaign literature pertaining to the adoption or defeat of a ballot issue identify themselves as the source thereof is not violative

[2] Mrs. McIntyre was unrepresented throughout the administrative proceedings and the administrative record is, therefore, a sparse one. Prior to the March 19th hearing, Mrs. McIntyre wrote a letter to counsel for the Ohio Elections Commission acknowledging that some of the leaflets she had distributed were unsigned. (J.A.12). At the hearing, she both denied any intent to violate the law and objected to the law as "an infringement of her First Amendment rights." (J.A.36, 38-39). She also testified that she had talked to many other people who were concerned about the levy and felt she was representing their views as well as her own. (J.A.38). Assistant Superintendent Hayfield repeated the statement made in his prior affidavit, that he had seen Mrs. McIntyre distribute leaflets without her name and address.

The Commission's decision upholding the complaint was issued the same day. It was not accompanied by any written opinion and contained no factual findings other than the implicit finding that Mrs. McIntyre had distributed anonymous leaflets and thereby violated the law. Thus, the only issue raised or considered on appeal by the Ohio state courts was whether the ban on anonymous campaign literature set forth in §3599.09 is constitutional.

of the right to free speech guaranteed by the First Amendment to the United States Constitution and Section 11, Article I of the Ohio Constitution.

(Pet.App. A1).[3]

SUMMARY OF ARGUMENT

Petitioner Margaret McIntyre has been fined under §3599.09 of the Ohio Election Code for preparing and distributing leaflets urging a vote against a school tax levy because the leaflets did not contain her name and address. The Ohio Supreme Court held that §3599.09 does not violate the First Amendment even though it indiscriminately bans the distribution of all anonymous political campaign literature. The Ohio Supreme Court erred in upholding the statute because its decision is inconsistent with *Talley v. California*, 362 U.S. 60 (1960), which holds that a flat ban on anonymous leafletting is unconstitutional because it deters the speech of those who fear retaliation and thereby restricts freedom of expression.

This Court's protection of anonymous speech in *Talley* rests on a firm historical foundation. The drafters of the Constitution were well aware of efforts by the government of England to punish political and religious dissenters for their anonymous publications. The drafters were also aware of the frequent use of anonymous political publications to criticize the English governance of the American colonies. The use of anonymous political publications as part of public discourse continues today. Consistent with this history and practice, the Court has repeatedly held that the First Amendment protects anonymous speech. *E.g., Thomas v. Collins*, 323 U.S. 516 (1945); *Bates v. Little Rock*, 361 U.S. 516 (1960); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

[3] According to Rule 1(b) of the Ohio Supreme Court Rules for the Reporting of Opinions, this statement, which is the syllabus of the case, "states the controlling point or points of law decided . . . ."

The constitutionality of §3599.09 is to be measured by the compelling state interest test because it is a regulation of the fundamental right to speech and press. Most recently, this Court applied the compelling state interest test in reviewing the regulation of election related speech in *Burson v. Freeman*, 504 U.S. __, 112 S.Ct. 1846 (1992). The Ohio Supreme Court erred in concluding that the more relaxed standard of review applicable to ballot access and voting regulations was applicable to this case. This is because §3599.09 is a regulation of political speech in public places intended to persuade voters and is not a ballot access or voting regulation.

Applying a strict scrutiny standard, §3599.09 is unconstitutional because Ohio has not demonstrated a compelling state interest and has not narrowly tailored its law. The failure of §3599.09 to serve a compelling state interest is demonstrated by the fact that it covers all anonymous election related leaflets and pamphlets. It is not confined to intentionally false and fraudulent statements. In addition, it extends to communications about referendum issues that cannot be smeared or libeled. *Illinois v. White*, 506 N.E.2d 1284 (Ill. 1987). Section 3599.09 is not narrowly tailored because it extends to election related publications at any time in any place. As a consequence, it is a prophylactic rule requiring disclosure, even when no legitimate interest is actually served.

Finally, §3599.09 is unconstitutional as applied to the facts of this case. Petitioner is a street corner leafletter who has engaged in core political speech about a public issue. As a result, no law, including §3599.09, can be applied to her speech without violating the First Amendment. *Lovell v. Griffin*, 303 U.S. 444 (1938).

ARGUMENT

Ohio's indiscriminate statutory prohibition against the distribution of anonymous election campaign leaflets and other publications is unconstitutional on its face and as applied to Mrs. McIntyre's leaflets. Included within its reach are campaign publications, like Mrs. McIntyre's, that are disseminated in order to "promote the adoption or defeat of any issue" in a nonpartisan referendum. In fact, the statute is so broad that, had it been in effect during the nonpartisan campaign to ratify the United States Constitution, it would have prohibited the publication and distribution of the FEDERALIST PAPERS because, like Mrs. McIntyre's leaflets, they lacked the "name and residence . . . of the person . . . responsible therefore."

I. OHIO'S PROHIBITION AGAINST THE DISTRIBUTION OF ALL ANONYMOUS POLITICAL CAMPAIGN LITERATURE IS UNCONSTITUTIONAL ON ITS FACE

A. Ohio Revised Code §3599.09 Is Inconsistent With *Talley v. California* Because It Indiscriminately Bans The Distribution Of All Anonymous Political Campaign Literature

The Ohio Elections Commission has fined Margaret McIntyre solely for preparing and distributing anonymous political leaflets urging recipients to vote against a school tax levy. Her conduct has been found to be a violation of Ohio Revised Code §3599.09, which prohibits anonymous, election related leafletting and pamphleteering.

Ohio's statute prohibits every form of anonymous written communication pertaining to elections including any "notice, placard, dodger, advertisement, sample ballot, or any other form of general publication." It extends to anonymous printed or written communications "de-

signed to promote the nomination or election or defeat of a candidate, or to promote the adoption or defeat of any issue, or to influence the voters in any election."

The indiscriminate reach of the Ohio law is irreconcilable with this Court's reasoning in *Talley v. California*, 362 U.S. 60, which held that an ordinance prohibiting distribution of anonymous leaflets and pamphlets addressing "public matters of importance" is void on its face. *Id.* at 65. As this Court explained in *Talley*, the prohibition of anonymous leafletting is unconstitutional because "it would tend to restrict freedom to distribute information and thereby freedom of expression." *Id.* at 64. Specifically, people who wish to communicate their political views, but who fear retaliation, are likely to remain silent if they are compelled to disclose their identities.

In *Talley*, the defendant was arrested after he distributed a handbill that did not contain his name. It urged a boycott of certain merchants who sold goods manufactured by companies that allegedly engaged in employment discrimination. The handbill named the merchants that the defendant believed should be boycotted and said they should be boycotted because they carried the products of "manufacturers who will not offer equal employment opportunities to Negroes, Mexicans and Orientals." *Id.* at 61. Each of the handbills had a blank "which, if signed, would request enrollment of the signer as a 'member of the National Consumers Mobilization,'" an organization whose name and address appeared on the handbill. *Id.* Nonetheless, Talley was arrested, tried and convicted for violating a Los Angeles ordinance that prohibited the distribution of "any hand-bill in any place under any circumstances, which does not have printed on the cover, or the face thereof, the name and address of . . . (a) [t]he person who printed, wrote, compiled or manufactured [it] . . . [and] (b) [t]he person who caused the [handbill] to be distributed." *Id.* at 60-61.

This Court reversed Talley's conviction and fine of $10 on the ground that the sweeping identification requirement imposed by Los Angeles placed an impermissible restriction on constitutionally protected speech. The broad Ohio ordinance challenged in this case, like the "broad Los Angeles ordinance" struck down in *Talley*, *id.* at 65, is subject to the same infirmity.

B. Anonymous Leaflets Have Played An Important Role In The Nation's Political History By Facilitating The Expression Of Unpopular Views And Thereby Broadening The Scope Of Political Debate

Throughout history, anonymity has often been essential for political dissidents who faced persecution if their identities became known. Sometimes that persecution takes the form of official prosecution. Sometimes it takes the form of social ostracism. In either event, the ability to speak anonymously often provides a safe haven for those who wish to express unpopular views. As this Court observed in *Talley*: "Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind." 362 U.S. at 64.

This is particularly true during moments of high political tension when the tolerance for robust debate is often overwhelmed by the impulse toward political and enforced political orthodoxy. It is not, surprising, therefore, that the tradition of anonymous literature reached its apogee in this country during the period immediately surrounding the Revolutionary War. The tradition of anonymous political literature, however, was already well-established in England where "Defoe, Swift and Johnson, as well as many lesser known authors, published anonymous political pamphlets critical of affairs in England." Note, "The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil," 70 Yale L.J. 1084, 1085 (1961), citing Courtney, THE SECRETS OF

OUR NATIONAL LITERATURE 151-77 (1908).[4]

In America, "prominent persons used anonymous pamphlets and the unsigned letter to the editor to express their views on public issues." *Id.* at 1085. Pseudonymous political satires were common. *See* Bailyn, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 11 (1967). Indeed, as this Court pointed out in *Talley:*

> Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day [footnote omitted]. Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names.

362 U.S. at 65.

The historical importance of protecting anonymous political publications has not diminished with time. One need look no further than George F. Kennan's landmark article formulating the foreign policy of containment of Soviet expansionism as the wisest way to address the problems of America's international relations with the U.S.S.R. Kennan, who was then a State Department official, published his article in the *Foreign Affairs* quar-

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[4] This caution was well-founded. The English Crown responded harshly to its critics. Those who could be identified faced severe punishment. *See generally* Chafee, THE BLESSINGS OF LIBERTY 190-207 (1956). In one particularly notorious example, "John Lilburne was whipped, pilloried and fined for refusing to answer questions designed to get evidence to convict him or someone else for the secret distribution of books in England." *Talley*, 362 U.S. at 65.

terly under the pseudonym of "X".[5] The policy proposed in that article became the basis of America's policy toward the Soviet Union in the decades that followed.

Similarly, in the realm of domestic politics, publications continue to appear under pseudonyms. For example, the inner workings of Chicago machine politics were revealed in a satirical book entitled THE ELECTION CHICAGO STYLE by Ward Heeler.[6] The book's introduction, written by a Chicago journalist, explained that Ward Heeler was the pseudonym of a prominent elected official who had to remain anonymous. "Were he to be discovered, his fellow politicos would speedily sentence him to political death. He would not be reslated for office, his years of achievement within the organization would be erased."[7]

Local community activists, like petitioner, do not face removal from office for expressing unpopular views. But the consequences of dissent can be even more daunting when dealing with local community politics where passions are frequently intense and personal relationships are more intimate. The dissent below underscored that concern, noting that:

> [I]t is possible that the very filing of the charge against McIntyre was in some measure in retaliation for her opposition to the school levy. Certainly, the timing of the filing is suspect. McIntyre distributed the leaflets in April 1988, but the complaint was not filed until one year later. According to McIntyre, in the intervening period the school levy had been defeated twice but succeeded on the third attempt shortly prior to the filing of the complaint. It would appear that as soon as the levy was safely passed, the school district, in the person of the assistant superintendent of elementary education, sought retribution against McIntyre for her opposition.

(Wright, J., dissenting)(Pet.App. A10). That is precisely the evil that this Court identified in *Talley* and that the First Amendment is designed to prevent.

C. The Protection For Anonymous Political Speech Recognized In Tally Is Supported By Overwhelming Precedent

Talley's protection of anonymous communication does not stand alone. This Court had recognized the relationship of anonymity to freedom of speech in other cases. The first such case was *Thomas v. Collins*, 323 U.S. 516. There, the Court invalidated the conviction of a union organizer for giving a speech advocating that listeners join his union without first registering with state authorities by obtaining an organizer's card. The Court overturned the conviction because the registration requirement punished the defendant for making a speech without first disclosing his identity to the State of Texas via the statutory registration requirement.

In *NAACP v. Alabama*, 357 U.S. 449 (1958), this Court addressed the danger of compelled disclosure of the names of NAACP members to state officials. In that case, the Court overturned a discovery order that required the NAACP to disclose membership lists to the Alabama Attorney General. The State had claimed that it was entitled to the lists as part of proceedings to enforce laws governing out-of-state corporations. This Court held that the compelled disclosure of NAACP membership lists violated the First Amendment right to political association because such disclosure would inter-

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[5] "The Sources of Soviet Conduct," 25 Foreign Affairs 566 (1947).

[6] Ward Heeler, THE ELECTION CHICAGO STYLE (1977).

[7] Walter Jacobsen, *Introduction* to *id.*

fere with the organization's efforts to disseminate its views:

> This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. When referring to the varied forms of governmental action which might interfere with freedom of assembly, it said in *American Communications Ass'n v. Douds*, *supra*, 339 U.S. [382] at page 402, 70 S.Ct. [674] at page 686 [(1950)]: 'A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature.' Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order.

Id. at 462.

This Court took similar positions in *Bates v. Little Rock*, 361 U.S. 516, and *Shelton v. Tucker*, 364 U.S. 479. *Bates* held that municipalities could not make disclosure of the names of NAACP members an automatic requirement for compliance with the municipalities' occupational license tax laws. This is because the compelled disclosure of names raised the prospect of "suppression or impairment [of First Amendment rights] through harassment, humiliation or exposure by government." 361 U.S. at 528 (Black, J., concurring). The Court made clear that, "[w]here there is such a significant encroachment upon personal liberty, the State may prevail only upon the showing of a subordinating interest which is compelling." *Id.* at 524. Similarly, in *Shelton v. Tucker*, decided a few months after *Talley*, this Court invalidated an Arkansas statute compelling every public school teacher to file an annual affidavit disclosing every organization to which the teacher had belonged or contributed to. According to *Shelton*: "Public exposure, bringing with it the

possibility of public pressures upon school boards to discharge teachers who belong to unpopular or minority organizations, would simply operate to widen and aggravate the impairment of constitutional liberty." 364 U.S. at 486-87.

This Court has been consistent in protecting citizens against government compelled disclosure of identity in other contexts, as well. For example, in *Lamont v. Postmaster General*, 381 U.S. 301, this Court invalidated a federal statute prohibiting an addressee from receiving mail determined to be foreign political propaganda unless the addressee first provided the postal service with a written statement in which the addressee identified himself and indicated his desire to receive the mail. According to the Court: "This amounts in our judgment to an unconstitutional abridgment of the addressee's First Amendment rights. The addressee carries an affirmative obligation which we do not think the Government may impose on him." *Id.* at 307. *See also Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963).

This Term the Court reiterated the importance of the principle protecting against compulsory disclosure in *Department of Defense v. Federal Labor Relations Auth.*, __ U.S. __, 62 U.S.L.W. 4143 (Feb. 23, 1994). There the Court rejected a claim that the Freedom of Information Act justified compelling the government to disclose the home addresses of government employees to collective bargaining representatives. The Court observed: "Because a very slight privacy interest would suffice to outweigh the relevant public interest, we need not be exact in our quantification of the privacy interest. It is enough for present purposes to observe that the employees' interest in nondisclosure is not insubstantial." *Id.* at 4147.

The fear of reprisal generated by compulsory disclosure requirements has been a recurrent concern for contemporary political dissenters. The *Talley* Court acknowledged this concern when it observed that the rea-

son for its rulings in *Bates v. Little Rock*, 361 U.S. 516, and *NAACP v. Alabama*, 357 U.S. 449, "was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." 362 U.S. at 65. Its point was made with additional force in *Shelton v. Tucker*, where the Court addressed the adverse impact of compulsory disclosure of political affiliations by teachers:

> It is not disputed that to compel a teacher to disclose his every associational tie is to impair that teacher's right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society. *De Jonge v. Oregon*, 299 U.S. 353, 364 [(1937)]; *Bates v. Little Rock*, *supra*, at 522-523. Such interference with personal freedom is conspicuously accented when the teacher serves at the absolute will of those to whom the disclosure must be made -- those who any year can terminate the teacher's employment without bringing charges, without notice, without a hearing, without affording an opportunity to explain.

364 U.S. at 485-86.

The same point was acknowledged in *Lamont* when the Court acknowledged the intimidating impact of the requirement that an addressee of "communist propaganda" identify himself by means of a written request in order to receive the mail: "The regime of this Act is at war with the 'uninhibited, robust, and wide open' debate and discussion that are contemplated by the First Amendment." 381 U.S. at 307, quoting *New York Times Company v. Sullivan*, 376 U.S. 254, 270 (1964).[8]

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[8] The lower courts also have been sensitive to the need for anonymity (continued...)

Talley v. California and the subsequent cases supporting the First Amendment right against compelled disclosure apply with undeniable force to petitioner McIntyre's case. At the time of her leafletting, she was a Westerville school district resident with school age children who was actively opposing a tax levy aggressively supported by school officials. As a consequence, whatever petitioner's motives for distributing unsigned leaflets, any parent publicly objecting to a tax levy could legitimately worry that such advocacy might cause opponents in the community to retaliate in some measure.

II. OHIO REVISED CODE §3599.09 CANNOT SURVIVE STRICT SCRUTINY

A. Ohio Revised Code §3599.09 Is A Regulation That Must Be Measured By The Compelling State Interest Test

According to the decisions of this Court, for the State of Ohio to justify its prohibition of anonymous "campaign literature pertaining to the adoption or defeat of a ballot issue," it must first establish that it has a compelling state interest in doing so. This Court has consistently held that any state law which regulates the fundamental rights of speech and press is invalid in the absence of a showing of a compelling state interest. Justice Harlan, concurring in *Talley*, explained:

> In judging the validity of municipal action affecting rights of speech or association protected against invasion by the Fourteenth Amendment, I do not believe that we can escape, as Mr. Justice Roberts said in

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[8] (...continued)
to protect litigants from possible retaliation. *See Doe v. Small*, 934 F.2d 743, 749 n.8 (1991), *superseded on other grounds*, 964 F.2d 611 (7th Cir. 1992). *See also Doe v. Stegall*, 653 F.2d 180 (5th Cir. 1981).

> *Schneider v. State*, 308 U.S. 147, 161 [(1939)], "the delicate balance and difficult task" of weighing "the circumstances" and appraising "the substantiality of the reasons advanced in support of the regulation of the free enjoyment of" speech. More recently we have said that state action impinging on free speech and association will not be sustained unless the governmental interest asserted to support such impingement is compelling.

362 U.S. at 66.

The same stringent standard of review was applied by this Court in *Meyer v. Grant*, 486 U.S. 414 (1988). There, a unanimous Court overturned a Colorado law making it a felony to pay persons for circulating petitions seeking the signatures necessary to trigger a referendum on a proposed law or state constitutional amendment. In upholding a lower court decision which invalidated the law, Justice Stevens explained: "We fully agree with the Court of Appeals' conclusion that this case involves a limitation on political expression subject to exacting scrutiny." *Id.* at 420.

This Court's most recent decision articulating the high burden of justification faced by Ohio in this case is *Burson v. Freeman*, 112 S.Ct. 1846. There the Court used the compelling state interest test to measure the constitutionality of a Tennessee law that prohibited the election day solicitation of voters within 100 feet of a polling place. In the course of upholding the statute, the Court explained that "a facially content-based restriction on political speech in a public forum . . . must be subjected to exacting scrutiny: The State must show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" *Id.* at 1851, quoting *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). *See also*

Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 126-28 (1989); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986).

There are sound reasons for measuring §3599.09 by the standard of strict scrutiny. First, §3599.09 is a regulation that chills core political speech by requiring speakers who feel the need for anonymity to identify themselves or to forego or modify their communication. For example, if Ward Heeler had been compelled to choose between identifying himself or not publishing his book, there would have been no book. *See* p.14, *supra*. At the local level in Ohio, every tax levy protestor now knows that he or she must comply with the identity requirement of §3599.09 or risk official punishment in the form of enforcement proceedings. Silence becomes the more attractive alternative.

Second, Ohio Revised Code §3599.09 must also be measured by the compelling state interest standard because it is a content based regulation. It compels pamphleteers to make their names and addresses part of their message when they advocate a particular outcome in an election. Such compulsion is an unconstitutional mode of content regulation because "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781, 795 (1988). This is so because state regulation of the speaker's decision as to how she can best communicate her views is unconstitutional regulation of political communication. "The First Amendment protects [appellant's] right not only to advocate [her] cause but also to select what [she] believe[s] to be the most effective means for so doing." *Meyer v. Grant*, 406 U.S. at 424.

The First Amendment interests affected by legislatively compelled communication have also been addressed in *Miami Herald v. Tornillo*, 418 U.S. 241 (1974). There, the Court invalidated a statute granting candi-

dates a right to equal newspaper space to answer criticism and attacks made by the newspaper. The Court rejected the statute because it had the effect of regulating the content of the newspaper and would therefore have discouraged robust campaign related debate. According to the Court, ". . . under the operation of the Florida statute, political and electoral coverage would be blunted or reduced." *Id.* at 257.

To the extent that statutes, like §3599.09, are enforced in the absence of a compelling state interest, it is inevitable that they will have an adverse impact on the speech of private citizens who fear community disapproval or official retaliation.

B. The Ohio Supreme Court Applied A Relaxed Standard Of Review Because It Erroneously Analogized The §3599.09 Ban On Anonymous Leafletting In Public Places To Ballot Access And Voting Regulation

Instead of using the compelling state interest standard, the Ohio Supreme Court erroneously substituted the relaxed standard of review employed by this Court in some of its cases addressing the constitutionality of ballot access and voting regulations. Thus, it mistakenly reasoned:

> [I]n *Burdick v. Takushi* (1992), 504 U.S. __, 112 S.Ct. 2059, 119 L.Ed.2d 245, the [United States Supreme] [C]ourt, in upholding the ban on write-in voting instituted by the state of Hawaii, recognized a different standard. The court observed as follows:
>
> "Election laws will invariably impose some burden upon individual voters. Each provision of a code, 'whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the

voting process itself, inevitably effects -- at least to some degree -- the individual's right to vote and his right to association with others for political ends.' *Anderson v. Celebrezze*, 460 U.S. 780, 788 [103 S.Ct. 1564, 1569-1570, 75 L.Ed.2d 547, 557] (1983). Consequently, *to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest*, as petitioner suggests, *would tie the hands of States seeking to assure that elections are operated equitably and efficiently*. See Brief for Petitioner 32-37. Accordingly, *the mere fact that a State's system 'creates barriers . . . tending to limit the field of candidates from which the voters might choose . . . does not of itself compel close scrutiny.' Bullock v. Carter*, 405 U.S. 134, 143 [92 S.Ct. 849, 856, 31 L.Ed.2d 92, 100] (1972); *Anderson, supra*, 460 U.S. at 788 [103 S.Ct., at 1569-1570, 75 L.Ed.2d, at 557]; *McDonald v. Board of Election Comm'nrs of Chicago*, 394 U.S. 802 [89 S.Ct. 1404, 22 L.Ed.2d 739] (1969)."

67 Ohio St.3d at 395, quoting *Burdick v. Takushi*, 504 U.S. __, 112 S.Ct. 2059, 2062-63 (1992)(emphasis added by the Ohio Supreme Court). (Pet.App. A6-A7). *But see Norman v. Reed*, 502 U.S. __, 112 S.Ct. 698, 705 (1992).

The source of the Ohio Supreme Court's erroneous use of a relaxed standard of review lies in its conclusion that §3599.09 is distinguishable from the ordinance in *Talley* because it can be treated as if it were an election law that "governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself . . . ." 67 Ohio St.3d at 395, quoting *Burdick v. Takushi*, 112 S.Ct. at 2063. (Pet.App. A6). In

fact, the Ohio Supreme Court mischaracterized §3599.09. The Ohio statute is not a statute governing the access of a candidate to the ballot. *Anderson v. Celebrezze*, 460 U.S. 780 (1983). It is not a statute governing the right of voters to write in the name of an unlisted candidate on the ballot. *Burdick v. Takushi*, 112 S.Ct. 2059. It is not a statute governing the fees to be charged candidates who seek to have their names listed on the ballot. *Bullock v. Carter*, 405 U.S. 134 (1972).

To the contrary, §3599.09 is a law that regulates distribution of political leaflets and pamphlets in public places to communicate views about the processes of government. It covers voters and people who cannot vote; it covers virtually anyone. As such, it regulates a pure form of speech that is entitled to the most rigorous protection that the First Amendment has to offer.

This Court repeatedly has underscored the high degree of First Amendment protection accorded to political leafletting in public places. It did so in *Talley* where it observed:

> In *Lovell v. Griffin*, 303 U.S. 444 [(1938)], we held void on its face an ordinance that comprehensively forbade any distribution of literature at any time or place in Griffin, Georgia, without a license. Pamphlets and leaflets, it was pointed out, "have been historic weapons in the defense of liberty" and enforcement of the Griffin ordinance "would restore the system of license and censorship in its baldest form." *Id.* at 452.

362 U.S. at 62. Justice Kennedy made a similar point in *International Society for Krishna Consciousness v. Lee*, 505 U.S. __, 112 S.Ct. 2711 (1992), when he observed that "[w]e have long recognized that the right to distribute flyers and literature lies at the heart of the liberties guaranteed by the Speech and Press Clauses of the First

Amendment." *Id.* at 2720 (Kennedy, J., concurring). *See also Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

There are important reasons for the Court's careful protection of leafletting and pamphleteering. They are the most basic means of political communication available to the average person. This is because:

> The pamphlet [George Orwell, a modern pamphleteer, has written] is a one-man show. One has complete freedom of expression, including, if one chooses, the freedom to be scurrilous, abusive, and seditious; or, on the other hand, to be more detailed, serious and "high-brow" than is ever possible in a newspaper or in most kinds of periodicals. At the same time, since the pamphlet is always short and unbound, it can be produced much more quickly than a book, and in principle, at any rate, can reach a bigger public. Above all, the pamphlet does not have to follow any prescribed pattern. It can be in prose or in verse, it can consist largely of maps or statistics or quotations, it can take the form of a story, a fable, a letter, an essay, a dialogue, or a piece of "reportage." All that is required of it is that it shall be topical, polemical, and short.[9]

Indeed, Professor Kalven once characterized leaflets and other inexpensive modes of political protest as equivalent "to the poor man's printing press." Kalven, "The Concept of the Public Forum," 1965 Sup.Ct.Rev. 1, 30.

Moreover, petitioner McIntyre's leafletting in the

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[9] George Orwell, *Introduction* in George Orwell and Reginald Reynolds, eds., British Pamphleteers (London, 1948-1951), I, 15, quoted in *Bailyn*, *supra* at p.2 (brackets in original).

present case has yet another claim to the greatest protection the First Amendment has to offer. Her leafletting communicated a political message about how citizens can best cast their votes on a public issue. She, therefore, was engaged in speech that is at the core of the First Amendment. As this Court stated in *Brown v. Hartlage*, 456 U.S. 45, 52 (1982): "At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed." Therefore, unlike voter and ballot access restrictions, regulation of the content of election related leaflets and other publications is regulation of the content of core political speech that cannot be measured by relaxed constitutional standards of review.

The central role of speech relating to election was reiterated in *Mills v. Alabama*, 384 U.S. 214 (1966), which invalidated a state statute imposing criminal penalties on the publication of election day newspaper editorials urging people to vote a certain way on an issue in a referendum. In that case, the editor of the *Birmingham Post-Herald* was convicted because his newspaper published an editorial that strongly urged readers to adopt the mayor-council form of government on the referendum ballot on the same day. The Court stated:

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes. The Constitution specifically selected the press, which includes not only newspapers, books and mag-

> azines, but also humble leaflets and circulars, *see Lovell v. City of Griffin*, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 [(1938)], to play an important role in the discussion of public affairs.

384 U.S. at 218-19.

The Illinois Supreme Court reached the same conclusion in *Illinois v. White*, 506 N.E.2d 1284, when it invalidated a provision of the Illinois election code, similar to Ohio's, prohibiting distribution of anonymous political campaign literature. The Illinois court observed:

> "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." (*Garrison v. Louisiana* (1964), 379 U.S. 64, 74-75, 85 S.Ct. 209, 216, 18 L.Ed.2d 125, 133). In attempting to regulate political speech, this statute touches the core of first amendment values. (*Brown v. Hartlage* (1982), 456 U.S. 45, 52, 102 S.Ct. 1523, 1528, 71 L.Ed.2d 732, 740). The concerns expressed in *Talley* cannot be avoided by the expedient of banning only the most important type of anonymous speech and leaving untouched other forms of expression less central to the purposes of the first amendment.

Id. at 1287. *See also Wilson v. Stocker*, 819 F.2d 943 (10th Cir. 1987).

The Ohio Supreme Court's error in using a relaxed standard of review was compounded in this case because Mrs. McIntyre's leaflets advocated views about the proper outcome of a nonpartisan referendum on a school tax levy. They discussed no candidates; they named no individuals. Certainly, the dissemination of such leaflets a week prior to the referendum vote is protected by the basic conceptions at the foundation of the First Amend-

ment.

The distinctive constitutional protection applicable to political advocacy during the course of a nonpartisan referendum has been addressed by this Court in previous cases. In *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), this Court invalidated a Massachusetts criminal statute that prohibited corporations from making contributions or expenditures "for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation." *Id.* at 768. It specified the high level of scrutiny applicable to speech pertaining to an issue on a referendum ballot:

> The constitutionality of §8's prohibition of the "exposition of ideas" by corporations turns on whether it can survive the exacting scrutiny necessitated by a state imposed restriction on freedom of speech. Especially where, as here, a prohibition is directed at speech itself [footnote omitted], and the speech is intimately related to the process of governing, "the State may prevail only upon showing a subordinating interest which is compelling," *Bates v. Little Rock*, 361 U.S. 516, 524 (1960); see *NAACP v. Button*, 371 U.S. 415, 438-39 (1963); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. at 463; *Thomas v. Collins*, 323 U.S. 516, 530 (1945), "and the burden is on the government to show the existence of such an interest." *Elrod v. Burns*, 427 U.S. 347, 362 (1976).

435 U.S. at 786.[10] This Court made the same point in

[10] The Ohio Supreme Court tried to avoid the holding in *Bellotti* by (continued...)

Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290 (1981), when it stated that campaign contribution limitations supporting advocacy related to ballot measures are burdens on political expression that are "always subject to exacting judicial scrutiny." *Id.* at 298.

C. Ohio Has Not Demonstrated A Compelling State Interest In A Flat Ban On The Distribution Of Anonymous Campaign Literature

The Ohio Supreme Court attempted to justify §3599.09 by asserting two interests. First, the Ohio Court found that "the disclosure requirement is clearly meant to 'identify those responsible for fraud, false advertising and libel.'" 67 Ohio St.3d at 394, quoting *Talley v. California*, 362 U.S. at 64. (Pet.App. A5). Second, it found that compliance with §3599.09 would enable voters to do a better job of evaluating the contents of political campaign communications if the communicators were identified. 67 Ohio St.3d at 395. Neither justification is

[10] (...continued)
citing to footnote 32 which suggests that an identification requirement might be imposed on political advertising by corporations that had a business interest in the outcome of a referendum election. 67 Ohio St.3d at 395. (Pet.App. A6). However, petitioner in this case is not engaged in paid political advertising and this case raises no issue of regulating large campaign expenditures. Mrs. McIntyre is a private citizen who has employed the device of the "humble leaflet." *Mills v. Alabama*, 384 U.S. at 219. Neither she nor any other private citizens who agree with the views expressed in her leaflets can be said to have a business interest in the outcome of the referendum affecting the schools where they send their children. Moreover, this Court has recognized that the states may have special latitude in regulating the campaign related activities of corporations because of the accumulations of wealth that are possible by virtue of state-conferred corporate status. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

sufficient to uphold Ohio's ban on all anonymous campaign literature.

The "fraud, false advertising, and libel" justification fails, most obviously, because §3599.09 is not confined to anonymous leaflets containing false or fraudulent statements. As this Court stated in *Talley*: "The ordinance is in no manner so limited, nor have we been referred to any legislative history indicating such a purpose." 362 U.S. at 64. To the contrary, as the syllabus of the Ohio Supreme Court's opinion makes clear, *see* n.3, *supra*, §3599.09 covers *all* "persons responsible for the production of [anonymous] campaign literature pertaining to the adoption or defeat of a ballot issue," whether or not the literature contains any false or fraudulent statements. Moreover, §3599.09 applies, whether or not the persons it covers arguably bear responsibility for "production" of the campaign literature. Indeed, under §3599.09, the printer of anonymous campaign literature can also fairly be held responsible for any false or fraudulent statements it might contain.

Moreover, insofar as it applies to anonymous, referendum related literature, the Ohio Supreme Court's reliance on the quote in *Talley* concerning "fraud, false advertising and libel" is misplaced. The Ohio courts cannot allow state officials to circumvent the central holding in *Talley* merely by invoking this phrase in talismanic fashion. If the state's general interest in curbing "fraud, false advertising and libel" were sufficient to justify a prophylactic ban on anonymous literature, then *Talley* itself would have to be reversed.

Even the Ohio Supreme Court did not go that far in this case. Instead, it concluded that concerns about "fraud, false advertising and libel" are magnified in the context of an election and that §3599.09 responds to that concern by banning anonymous campaign literature only in the context of a political campaign. (Pet.App. A5-A8). That conclusion, however, does not solve the

problem; it merely restates it. As the Illinois Supreme Court explained in *Illinois v. White*:

> Implicit in the State's . . . justification is the concern that the public could be misinformed and an election swayed by an eleventh-hour anonymous smear campaign to which the candidate could not meaningfully respond. The statute cannot be upheld on this ground, however, because it sweeps within its net a great deal of anonymous speech completely unrelated to this concern. In the first place, the statute has no time limit and applies to literature circulated two months prior to an election as well as that distributed two days before. The statute also prohibits anonymous literature supporting or opposing not only candidates but also referenda. A public question clearly cannot be the victim of character assassination.

506 N.E.2d at 1288.

Petitioner has no quarrel with narrowly drawn election laws that prohibit fraudulent campaign practices or "dirty tricks." *See* n.13, *infra*.[11] But "precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963). Furthermore, the need for "precision" is enhanced, not diminished, when the state attempts to regulate the core political speech about the outcome of a referendum. As this Court has frequently observed: "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."

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[11] *See also* 2 U.S.C. §432(e)(4), which provides that "a political committee which is not an authorized committee shall not include the name of any candidate in its name."

Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964). In short, §3599.09 is fatally overbroad if conceived of as a fraud regulation, and thus cannot be sustained on those grounds.

For the same reason that "a public question clearly cannot be the victim of character assassination," 506 N.E. 2d at 1288, it does not pose opportunities for bribery or corrupt manipulation of candidates that justify contribution and reporting regulations in candidate elections. A referendum requires voters to take a position on inanimate policy matters. Unlike a candidate, a referendum cannot be a participant in the kind of *quid pro quo* transactions that lead to corruption. This point was articulated in *First National Bank of Boston v. Bellotti*, 435 U.S. at 790: "The risk of corruption perceived in popular elections . . . simply is not present in a popular vote on a public issue." This was underscored by Justice Stevens' concurring in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 678 (1990), where he observed that ". . . there is a vast difference between lobbying and debating public issues on the one hand, and political campaigns for election to public office on the other."

The second interest cited by the Ohio Supreme Court in support of §3599.09 is the interest in a better informed electorate. (Pet.App. A5-A6). Quoting a footnote from *First National Bank of Boston v. Bellotti*, 435 U.S. at 792 n.32, the Ohio Supreme Court ruled in this case that "[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." 67 Ohio St.3d at 395. (emphasis omitted)(Pet.App. A6).

The reliance on *Bellotti* is misplaced. *Bellotti* dealt with election related advertising by corporations. Even in that context, the Court's comments about disclosure were tentative. Of greater relevance to this case, the *Bellotti* Court was careful to point out that the state's

power to regulate the political speech of corporations that are themselves created by state law is distinct from the state's power to regulate the political speech of private individuals. 435 U.S. at 777-78.

The opinion below ignored that distinction entirely. It also ignored any potential distinction between candidates and noncandidates by indiscriminately endorsing an identification requirement that applies to all election related literature. It is arguable, at least, that a declared candidate for public office has a diminished interest in anonymous political speech related to the campaign. Conversely, the electorate has an enhanced interest in accurately understanding the candidate's political views, whether expressed directly or by those authorized to speak on the candidate's behalf. *See* 2 U.S.C. §441(d). A lone street corner pamphleteer, like petitioner, stands in a very different position, especially when the speech at issue is connected to a referendum campaign rather than a candidate election. Ohio's decision to merge all these issues together in a single prophylactic statute is constitutionally indefensible.

The First Amendment does not permit the state to regulate the content of political speech in such a broad and undifferentiated fashion, even if the state's goal is to assure a better informed electorate or to tone down the hyperbole of political debate. For example, it is inconceivable that the government could require speakers to discuss the weaknesses as well as the strengths of their political positions, even if "full disclosure" would lead to a better informed electorate. Such regulation is censorship in one of its simplest and boldest forms.

In addition it is counterproductive, as explained by the Illinois Supreme Court in *Illinois v. White*:

> By banning anonymity, the law deters many from expressing their opinions at all, resulting in the overall decrease in the flow of in-

> formation to the public. Far from creating a more informed electorate, the statute extinguishes sources of information. "A state's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism." *Anderson v. Celebrezze* (1983), 460 U.S. 780, 798, 103 S. Ct. 1564, 1575, 75 L.Ed.2d 547, 564.

506 N.E.2d at 1288.

The Ohio Supreme Court's conclusion that laws banning anonymous campaign leaflets insure an informed electorate has also been previously considered and rejected in *People of the State of New York v. Duryea*, 351 N.Y.S.2d 978, *aff'd*, 354 N.Y.S.2d 129 (1st Dep't 1974). There, in the course of invalidating a New York statute similar to the statute at issue in this case, the *Duryea* court observed:

> Of course, the identity of the source is helpful in evaluating ideas. But "the best test of truth is the power of the thought to get itself accepted in the competition of the market" (*Abrams v. United States*, 250 U.S. 616, 40 S. Ct. 17, 63 L.Ed. 1173 (1919)(Holmes, J.)). Don't underestimate the common man. People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message. And then, once they have done so, it is for them to decide what is "responsible," what is valuable, and what is truth.

351 N.Y.S.2d at 996.

D. Ohio's Flat Ban On The Distribution Of Anonymous Election Related Leaflets And Other Publications Is Not Narrowly Tailored To Achieve Whatever Constitutionally Legitimate Interests That The State May Have

In addition to its other defects, §3599.09 is unconstitutional because it is not narrowly tailored to serve appropriate governmental interests. This is because it indiscriminately requires that all "persons responsible for the production of campaign literature pertaining to the adoption or defeat of a ballot issue identify themselves as the source." It covers virtually every campaign publication distributed during an election. It is not even confined to a specific time period before an election during which the anonymous communication is to be regulated.[12]

Burson v. Freeman, 112 S.Ct. 1846, contains one of this Court's most recent statements that regulation of the

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[12] By contrast, *Burson v. Freeman*, 112 S.Ct. 1846, was confined to electioneering on election day. Similarly, the identification provision contained in the federal statute regulating campaign expenditures also appears to be more limited than §3599.09, and not to be directed at lone, street corner leafletters like Mrs. McIntyre. Specifically, the identification requirement set forth in 2 U.S.C. §441(d) only applies in federal candidate elections (not to referenda). And, even then, it applies only in case of "express advocacy," a term that has been narrowly defined by this Court. *See Federal Election Comm'n v. National Conservative Political Action Committee*, 470 U.S. 480 (1985). Moreover, §441(d) is presumably not intended to apply to an individual who makes a *de minimis* cash expenditure to finance some leaflets protesting passage of a tax levy. *Buckley v. Valeo*, 424 U.S. 1 (1976). Finally, the statute appears to be limited by this Court's rulings that the disclosure requirements of federal law cannot be enforced in instances where there is a legitimate fear that disclosure may chill constitutionally protected speech. *See Brown v. Socialist Workers' 74 Campaign Committee*, 459 U.S. 87 (1982). The Ohio law, as drafted by the state legislature and interpreted by the Ohio Supreme Court, contains neither these constitutional limitations nor constitutional safeguards.

content of speech must be narrowly tailored to achieve compelling state interests if it is to withstand a constitutional challenge. There, this Court upheld a ban on election day campaigning within 100 feet of polling places only because it was narrowly tailored to promote the state interests in protecting against voter intimidation and election fraud. *Id.* at 1851. *See also Perry Education Ass'n v. Perry Local Education Ass'n*, 460 U.S. at 45.

To the extent that Ohio's flat ban on anonymous pamphleteering at all times and all places and under all circumstances is an effort at fraud prevention, it can hardly be said to meet the Constitution's requirement that it be narrowly tailored. According to *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. at 803, "[w]here core First Amendment speech is at issue, the State can assess liability for specific instances of deliberate deception, but it cannot impose a prophylactic rule requiring disclosure even where misleading statements are not made" (Scalia, J., concurring). Similarly, in *International Society for Krishna Consciousness v. Lee*, 112 S.Ct. at 2726, it was observed that "'[b]road prophylactic rules in the area of free expression are suspect.' *NAACP v. Button*, [*supra* at] 438 . . ., and more than a laudable intent to prevent fraud is required to sustain the present ban" (Souter, J., concurring).

Even if one hypothesizes that corruption of a referendum election could be accomplished by inundation of the community with leaflets presenting only one viewpoint, §3599.09 is not narrowly tailored to address this possibility. It prohibits all anonymous leaflets and contains no limitations protective of the street corner leafletter whose activities do not involve the minimum expenditure required to trigger the kind of disclosure requirement approved in *Buckley v. Valeo,* 424 U.S. 1 (1976). In short, §3599.09 does not confine itself to those activities that may potentially distort the electoral process.

Moreover, §3599.09 provides that the Ohio Secretary of State can make regulatory exceptions for campaign literature too small to allow space for the name and address of the distributor. This exception is limited to "printed matter and certain other kinds of printed communications such as campaign buttons, balloons, pencils, or like items, the size or nature of which makes it unreasonable to add an identification or disclaimer." Exceptions for miniature campaign literature hardly constitute the narrow tailoring required by *Burson* and *Perry*. To the contrary, if Ohio were truly committed to §3599.09 as a means of fraud prevention, it would not have provided for any exceptions at all.

Finally, the overbreadth of the challenged statute in this case as a fraud prevention measure is underscored by the fact that Ohio's election code has companion provisions specifically designed to prevent fraud and false statements. Section 3599.091(B) makes it an offense for any person, during the course of a campaign for public office "with intent to affect the outcome of such campaign" to make false statements about a candidate.[13]

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[13] Section 3599.091(B) provides: No person, during the course of any campaign for nomination or election to public office or office of a political party, by means of campaign materials, including sample ballots, an advertisement on radio or television or in a newspaper or periodical, a public speech, press release, or otherwise, shall knowingly and with intent to affect the outcome of such campaign do any of the following:

(1) Use the title of an office not currently held by a candidate in a manner that implies that the candidate does currently hold that office or use the term "re-elect" when the candidate has never been elected at a primary, general, or special election to the office for which he is a candidate;

(2) Make a false statement concerning the formal schooling or training completed or attempted by a candidate; a degree, diploma, certificate, scholarship, grant, award, prize, or honor received, earned, or held by a candidate; or the period of time during which a candidate

(continued...)

Section 3599.092(B) states that "No person, during the course of any campaign in advocacy of or in opposition to the adoption of any ballot proposition or issue, by means of campaign material, [submitted to the voters] shall knowingly and with intent to affect the outcome of such campaign . . . (1) Falsely identify the source of a statement . . . [or] (2) Post, publish, circulate, distribute or otherwise disseminate a false statement . . . ."[14]

Thus, the terms of §3599.09 are not limited to punishment of wrongdoers, and the wrongdoers that can legitimately be punished are covered by other statutes.

III. OHIO REVISED CODE §3599.09 IS UNCONSTITUTIONAL AS APPLIED TO PUNISH DISTRIBUTION OF ANONYMOUS LEAFLETS OPPOSING PASSAGE OF A REFERENDUM ON A SCHOOL TAX LEVY

In addition to ignoring the facial invalidity of §3599.09, the Ohio Supreme Court also ignored the fact that the statute has been unconstitutionally applied to petitioner in this case. The unconstitutional application lies in the fact that Mrs. McIntyre's anonymous leaflets urged a vote against a tax levy and were neither fraudulent, libelous, nor false. Indeed, on the record in this case, the Ohio court did not and could not have found them to be so. Thus, the record is clear that distribution of her leaflets was a classic exercise of First Amendment

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[13] (...continued)
attended any school, college, community technical school, or institution;

(3) Make a false statement concerning the professional, occupational, or vocational licenses held by a candidate, or concerning any position the candidate date held for which he received a salary or wages;

(4) Make a false statement that a candidate or public official has been indicted or convicted of a theft offense, extortion, or other crime involving financial corruption or moral turpitude;

(5) Make a statement that a candidate has been indicted for any crime or has been the subject of a finding by the Ohio elections commission without disclosing the outcome of any legal proceedings resulting from the indictment or finding;

(6) Make a false statement that candidate or official has a record of treatment or confinement for mental disorder;

(7) Make a false statement that a candidate or official has been subjected to military discipline for criminal misconduct or dishonorably discharged from the armed services;

(8) Falsely identify the source of a statement, issue statements under the name of another person without authorization, or falsely state the endorsement of or opposition to a candidate by a person or publication;

(9) Make a false statement concerning the voting record of a candidate or public official;

(10) Post, publish, circulate, distribute, or otherwise disseminate a false statement, either knowing the same to be false or with reckless disregard of whether it was false or not, concerning a candidate that is designed to promote the election, nomination, or defeat of the candidate. As used in this section, "voting record" means the recorded "yes" or "no" vote on a bill, ordinance, resolution, motion, amendment, or confirmation.

[14] Section 3599.09.2(B): No person, during the course of any campaign in advocacy of or in opposition to the adoption of any ballot proposition or issue, by means of campaign material, including sample ballots, an advertisement on radio or television or in a newspaper or periodical, a public speech, a press release, or otherwise, shall knowingly and with intent to affect the outcome of such campaign do any of the following:

(1) Falsely identify the source of a statement, issue statements under the name of another person without authorization, or falsely state the endorsement of or opposition to a ballot proposition or issue by a person or publication;

(2) Post, publish, circulate, distribute, or otherwise disseminate, a false statement, either knowing the same to be false or acting with reckless disregard of whether it was false or not, that is designed to promote the adoption or defeat of any ballot proposition or issue.

freedom. "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." *Talley v. California*, 362 U.S. at 64 (quoting *Lovell v. Griffin*, 303 U.S. at 452).

Because Mrs. McIntyre's leafletting was pure speech, no statute can legitimately punish it. Thus, even if §3599.09 were valid on its face, it could not be used to punish petitioner simply for handing out unsigned leaflets urging voters to vote against a tax increase. Her advocacy cannot be said to be either false or libelous. As this Court said in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), "under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Id.* at 339-40. Similarly, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), makes clear that the only way that any legal sanctions can be imposed on the communication of a viewpoint is when that communication unmistakably includes a libelous statement of fact.

The teachings of *Gertz* and *Milkovich* are particularly applicable to this case because petitioner's leaflets addressed voters in a nonpartisan referendum. Her leaflets, which apparently infuriated Westerville school officials, merely communicated her opposition to passage of a school tax levy because, in her opinion, school officials were wasting taxpayer funds and were not keeping voters appropriately informed. The leaflets also complained that school officials ignored the advice of a citizens' commission to school officials about school boundaries. Such criticisms of public officials are hardly unique to petitioner's case. They are characteristic of virtually every election related debate and can not be punished or discouraged in a way that is consistent with the First

Amendment. As Justice Rehnquist pointed out in *Hustler Magazine v. Falwell*, 485 U.S. 46, 51 (1988):

> The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office or those public figures who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." *Associated Press v. Walker*, decided with *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164, 87 S.Ct. 1975, 1996, 18 L.Ed.2d 1094 (1967)(Warren, C.J., concurring in result).

If school officials were offended by anything petitioner said about the referendum, their recourse was in the marketplace of ideas, not the Ohio election code. In fact, there is evidence in the record that on at least one occasion they attempted to explain to the public why they believed Mrs. McIntyre's position was mistaken. (J.A.15). Their obligation to rely on public debate rather than legal sanctions to remedy their distaste for petitioner's statement is made clear in *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290. There, this Court held that the First Amendment provides a distinctive degree of protection for citizen participation in referendum campaigns. Chief Justice Burger made clear that contribution restrictions that are designed to protect candidates against the evils of corruption and undue influence can not constitutionally be applied to ballot measures. *Id.* at 297-98. In his view, ballot measures are not subject to either evil. *Id.* at 298.

By applying §3599.09 to punish petitioner's speech, the Ohio Court exceeded its constitutional authority.

CONCLUSION

For the reasons set forth above, petitioner Margaret McIntyre requests that this Court reverse the decision of the Ohio Supreme Court that §3599.09 is constitutional on its face and as applied.

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